

**MAR 10 2006****CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS****NOT FOR PUBLICATION****UNITED STATES COURT OF APPEALS****FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,

Plaintiff — Appellee,

v.

RICHARD WAYNE PARKER,

Defendant — Appellant.

No. 05-50254

D.C. No. CR-98-00749-CAS-01

MEMORANDUM<sup>\*</sup>

Appeal from the United States District Court  
for the Central District of California  
Christina A. Snyder, District Judge, Presiding

Argued and Submitted February 15, 2006  
Pasadena, California

Before: B. FLETCHER and CALLAHAN, Circuit Judges, and ENGLAND<sup>\*\*</sup>,  
District Judge.

Defendant Richard Wayne Parker appeals from the district court's denial of his motion for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure. Parker was convicted in his first trial of one count of filing a false tax

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<sup>\*</sup> This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

<sup>\*\*</sup> The Honorable Morrison C. England, United States District Judge for the Eastern District of California, sitting by designation.

return, 26 U.S.C. § 7206(1), and in his second trial of one count of conspiracy to possess cocaine, 21 U.S.C. § 846, and three counts of possession with intent to distribute cocaine, 21 U.S.C. § 841(a).<sup>1</sup> He filed this motion for a new trial based on allegedly newly discovered evidence. We affirm.

## I.

In July of 1997, 295 kilograms of cocaine were stolen from a Bureau of Narcotics Enforcement (“BNE”) evidence vault.<sup>2</sup> Parker was one of approximately ten law enforcement personnel who had the key and alarm code allowing entry into the vault. Investigators determined that three categories of cocaine had been stolen from the vault — kilograms wrapped in black and yellow rubber, kilograms marked “Gucci,” and kilograms marked with a handwritten “17.”

About a year later, in May 1998, FBI agents arrested a suspected cocaine trafficker, Gary Hensel, in an unrelated investigation; they discovered just over seven kilograms of cocaine in Hensel’s garage (“the Hensel kilograms”). Hensel informed the agents that he had wrapped the kilograms in saran wrap, zip-lock bags, and gray duct tape because he planned to transport the drugs to Michigan in

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<sup>1</sup> At his first trial Parker was also acquitted of certain possession counts and a money laundering count. The jury was hung on the conspiracy charge and the remaining possession charges.

<sup>2</sup> This cocaine was used by the BNE in reverse sting operations.

tires. Hensel cooperated with the investigators by making recorded telephone calls to his supplier, Monica Pitto. Accordingly, the agents were able to monitor a transaction between Pitto and Hensel in which Hensel provided Pitto with \$38,000 furnished by the government and obtained one kilogram of cocaine at Pitto's residence. Pitto indicated that she was meeting with her supplier in Pasadena, California, later that same day. Agents then followed Pitto, and at around noon, she met Parker on the rooftop of a parking garage, where she provided him with an envelope containing \$47,000. Both Pitto and Parker were then apprehended.

Pitto became a cooperating witness and told agents that Parker had been supplying her with cocaine since 1992. Pitto stated that Parker delivered cocaine to her on consignment in gym bags and expected money after she sold the drugs. She estimated that he had provided her with between 120-130 kilograms of cocaine between 1996 and 1998 alone.

Agents searched Parker's BNE vehicle after his arrest, finding over \$79,214 in cash in twelve different locations in the truck. They also recovered from the truck seven guns and two distraction grenades. In the search of his house and other locations associated with Parker, agents discovered \$66,000 in a wall safe, \$113,500 in a black pistol case, and \$284,540 in Parker's personal vehicle. In the searches of locations associated with Parker, agents found 25 gym bags, some

containing cash, that were big enough to transport a kilogram or more of cocaine. Sixteen of the bags contained trace amounts of cocaine.

Also discovered in these searches were receipts for cash purchases Parker had made during the year between the burglary and his arrest, totaling \$74,540.66. The income Parker reported on his tax return for this year was \$55,000. Over the course of the investigation, agents learned of many purchases that Parker had made using cash, including numerous used vehicles, expensive gifts for his girlfriend, and rent for an apartment he rarely used.

In October of 1999, following his second trial, Parker was convicted by a jury of one count of conspiracy to possess cocaine, and three counts of possession with intent to distribute cocaine. In January of 2000, he was sentenced to life imprisonment, five years of supervised release, a \$16 million fine, and a \$500 special assessment.

In January of 2003, Parker filed a motion for a new trial based on allegedly new evidence pursuant to Rule 33 of the Federal Rules of Criminal Procedure. The basis for this motion was a report written by Anaheim Police Sergeant Donald Klein. This report inventoried the 600 kilograms of cocaine seized by the Anaheim Police Department (“APD”) in 1994. The APD turned over a portion of the 600 kilograms to the BNE and retained some for its own operations. After the BNE

evidence vault was burglarized, the cocaine retained by the APD, “the Anaheim kilograms,” was compared to the cocaine recovered in this investigation. At trial, Oulton linked Parker to the BNE burglary by testifying that in his opinion the Hensel kilograms were from the same source as the Anaheim kilograms. Oulton determined that the wrappers from the Anaheim cocaine and the Hensel cocaine both included a clear plastic layer with the number “17” handwritten on it and a simulated wood contact paper with Spanish writing indicating that it was made in Medellin, Columbia. The kilograms were wrapped in the exact same way, except that the Hensel cocaine had a loose outer wrapping of ziplock bags and duct tape that Hensel indicated he had added in order to protect the drugs while they were being transported in tires. Parker called into question the validity of this link by pointing out that Klein’s report suggested that the APD did not retain any cocaine with the distinctive “17” marking that Oulton testified to finding in both the Hensel and the Anaheim kilograms. Thus, Parker concluded the Anaheim kilograms must have been tampered with before being tested by Oulton.

On March 10, 2005, the district court denied Parker’s motion for a new trial, finding that Parker had not shown that the evidence was, in fact, “new.” The district court further held that even if the evidence was new, the other evidence

presented against Parker was so overwhelming that the new evidence would not have changed the outcome of the trial.

## II.

The district court's denial of a motion for a new trial based on newly discovered evidence is reviewed for abuse of discretion. *United States v. Sarno*, 73 F.3d 1470, 1507 (9th Cir. 1995); *United States v. Bischel*, 61 F.3d 1429, 1436 (9th Cir. 1995).

To prevail on a Rule 33 motion for a new trial, the movant must satisfy a five-part test:

- 1) the evidence must be newly discovered;
- 2) the failure to discover the evidence sooner must not be due to defendant's lack of diligence;
- 3) the evidence must be material to the issues at trial;
- 4) the evidence must be neither cumulative nor merely impeaching; and
- 5) the evidence must indicate that a new trial would probably result in acquittal.

*United States v. Kulczyk*, 931 F.2d 542, 548 (9th Cir. 1991); *see also Pitts v. United States*, 263 F.2d 808, 810 (9th Cir. 1959).

Parker argues that the Klein report is new evidence that was not produced to him in discovery. In support of this assertion, Parker points to the following portion of his counsel's cross-examination of Klein during his retrial:

- Q. You've testified that 17[ marking]s are rare. Do you have any records or anything to support how many 17s were in that seizure?
- A. I wrote a report on the kilos that were seized after the fact. I don't know if you have a copy of that or not.
- Q. *I do not.* Do you?
- A. Yes, I do.

Parker argues that this exchange shows that the report was not produced to him and asserts, but does not show, that Parker's counsel did not review the Klein report during his cross-examination of Klein.

The government argues in response that it did, in fact, produce the Klein report for Parker. The government produced various documents to show that the report, stamped Bates number 13008-13009, was produced to Parker. First, the government produced a declaration of Rebecca Lonergan, an Assistant U.S. Attorney on Parker's case, who sent the report in a box of documents to Parker's counsel of record on December 21, 1998. She attached the cover letter to Parker's counsel, inventorying the items being produced, including "13008-13009: Anaheim PD report dated 11/18/98 by Sgt. D. Klein re: markings of kilograms." Lonergan also stated that her system was to review the discovery package to ensure that it had all items listed in the cover letter. She indicated that she maintained a discovery index of all items produced, had consulted the index, and that it indicated that the document numbered 13008-13009 was produced.

Second, the government produced a declaration of Lizabeth Rhodes, an Assistant U.S. Attorney who worked the Parker trial. She stated that on January 23, 2000, she copied all documents produced in the Parker case for production in a second case, without adding any documents. Her attached cover letter lists Bates stamped documents 13008-13009.

Third, the government points out that Parker's counsel himself made use of Klein's report during the retrial. While Parker's counsel was cross-examining Special Agent William Bodner, Agent Bodner indicated that he was not aware of the Anaheim seizure. Parker's counsel then presented him with a report that he identified as showing "a total of 607 kilos of which 420 were released to Riverside Office of the Department of Justice Bureau of Narcotics Enforcement, and there is a notation . . . [that] 126 [were] in yellow tape with number "17" written on them."

Merely pointing to his counsel's out-of-context assertion during the Klein cross-examination that he did not have the Klein report does not demonstrate that the report was not disclosed to Parker. This is particularly the case since Klein



went on to produce and describe the report.<sup>3</sup> If anything, this passage shows that the report was specifically called to the attention of Parker's counsel from among the over 20,000 pages of documents produced by the government in this case. The transcript also shows that Parker's counsel himself later utilized the report in a cross-examination. The district court did not abuse its discretion in denying Parker's new trial motion on the basis that the report had been produced and was not new evidence.

**AFFIRMED.**

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<sup>3</sup> The trial transcript continues:

Q. *I do not.* Do you?

A. Yes, I do.

Q. Okay. And would that report assist the jury in knowing how many 17s were in that seizure?

A. I think so, yes.

Q. Would you look at that report?

A. Sure.

...

A. It's a two-page report. On the second page, I have down here that there are 126 in yellow tape with the number "17" written on them.